Criminal Law and Procedure
Fall 2001
Supplement

Legal Training Section
(517) 322-6704

CRIMES AGAINST PROPERTY

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Uttering and Publishing

📖 People v Aguwa, 245 Mich. App. 1 (2001)

The defendants in this case obtained a stolen Discover credit card and false Utah identification. They went to two JC Penny stores and purchased $3,000 in gift certificates. They then purchased cologne and a ring using the certificates. Later the same evening, they returned to exchange the ring for a cash refund. Security was called and the two were arrested.

They were charged with uttering and publishing for their use of the gift certificates. "Although defendant presented 'facially valid' gift certificates, defendant's fraudulent acts induced the creation of the gift certificates. Thus, the gift certificates purported to be legally valid instruments, the presentment of which would entitle defendant to valuable goods and services. However, defendant had no legal right to own, present, or convert the gift certificates into valuable goods and services. Nevertheless, defendant presented the gift certificates to the J.C. Penney store clerk, thus asserting their genuineness, knowing that the instruments were fraudulently acquired, and demanded goods to which he was not entitled and for which liability in someone other than defendant might have been created if defendant could have accomplished his illegal purpose. We hold that such conduct is proscribed by the uttering and publishing statute."

Add to page 5-18

Larceny by conversion

📖 People v Mason, C/A No. 219630 (July 27, 2001)

Defendant in this case operated a mobile home company. On four different occasions he signed contracts with buyers to sell them a home. As part of the contract he would require a partial down payment. On each occasion he would take the down payment and deposit it in his personal account rather than his two business accounts. Shortly after the transactions the company closed. The homes were not delivered and the down payments were not returned.

Mason was charged with larceny by conversion, but the trial court would not bind him over on the grounds that it was more of a civil complaint and not a criminal one. The Court of Appeals reinstated the charges.

HELD – "The evidence adduced at the preliminary examinations presents probable cause to believe that (1) the property at issue had value because it was money, (2) the money did not belong to Mason, (3) each complainant delivered the money to Mason, (4) Mason fraudulently converted the money to his own use when he deposited it in his personal bank account without completing the mobile home sales for each complainant, and (5) Mason intended to deprive the complainants of their money permanently when he ceased operating Mason Homes without refunding the money to them."

CRIMES AGAINST PERSONS

Add to page 4-3

Statute of Limitations - Public Act 6 of 2001 MCL 767.24 May 2, 2001

(1) An indictment for murder, or criminal sexual conduct in the first degree, or a violation of MCL 750.200 to 750.212a, that is punishable by life imprisonment may be found and filed at any time.

(2) An indictment for a violation or attempted violation of MCL 750.145c, 750.520c, 750.520d, 750.520e, and 750.520g, may be found and filed as follows:

(a) Except as otherwise provided in subdivision (b), an indictment may be found and filed within 10 years after the offense is committed or by the alleged victim's twenty-first birthday, whichever is later.

(b) If evidence of the violation is obtained and that evidence contains DNA that is determined to be from an unidentified individual, an indictment against that individual for the violation may be found and filed at any time after the offense is committed. However, after the individual is identified, the indictment shall be found and filed within 10 years after the individual is identified or by the alleged victim's twenty-first birthday, whichever is later.

(c) As used in this subsection:

(i) "DNA" means human deoxyribonucleic acid.

(ii) "Identified" means the individual's legal name is known and he or she has been determined to be the source of the DNA.

(3) An indictment for kidnapping, extortion, assault with intent to commit murder, attempted murder, manslaughter, conspiracy to commit murder, or first-degree home invasion shall be found and filed within 10 years after the offense is committed.

(4) All other indictments shall be found and filed within 6 years after the offense is committed.

(5) Any period during which the party charged did not usually and publicly reside within this state is not part of the time within which the respective indictments shall be found and filed.

The legislature intends that the extension or tolling, as applicable, of the limitations period provided in this amendatory act shall apply to any of those violations for which the limitations period has not expired at the time this amendatory act takes effect.

Add to page 4-17

Juvenile Offenders and the Sex Offender Registration

📖 People v Rahilly, C/A No. 227682 (July 31, 2001)

Defendant was convicted of CSC fourth and sentenced pursuant to the Holmes Youthful Training Act. After serving his sentence, he requested that his name be removed from the Sex Offender Registration list. The trial court granted his motion but the Court of Appeals reversed.

“SORA provides that the term of the registration shall occur for twenty-five years from the time or registration or ten years following release from a state correctional facility, whichever is longer. There is no exception to this time frame for youthful trainee status. We cannot assume that this was an inadvertent omission by the Legislature.”

Add to page 7-13

Gross Indecency – Overt sexual act

📖 People v Drake, C/A No. 224398 (July 6, 2001)

Defendant invited minor girls to participate in a contest where they could win $5,000. He stated that they could win various points for different activities including beating him, spitting on him and his food, and providing him with urine, feces and used tampons. The girls were also given money and cigarettes. The girls observed the defendant eat the urine and feces and would collectively beat him. The girls and defendant testified that they were fully clothed during the activities with the defendant and that although he "got high" from these activities, the girls never saw him sexually gratify himself or engage in any overt sexual touching or contact with them.

Based on these activities, he was charged with gross indecency. The trial court dismissed the charges because there was no overt sexual act. The Court of Appeals reversed and reinstated the charges. "In order to constitute grossly indecent behavior, the acts must be overt in the sense that they are open and perceivable. The motivation for the behavior can be inferred from the totality of the circumstances, and should be considered on a case by case basis. Clearly, it is easier to establish the sexual motivation for the behavior if the act in issue involves sexual intercourse, oral sexual stimulation, masturbation, or the touching of another person's genitals or anus. Nonetheless, the sexual nature of the activity can be inferred even in the absence of such behavior." Based on the activities and the testimony that the defendant "got high" from the contact, there was sufficient evidence to bind him over on gross indecency charges.

Add to page 4-3

Legal impossibility as a defense

📖 People v Thousand, MSC No. 116967 (July 27, 2001)

Undercover officers signed onto the Internet as a 14-year-old girl named "Bekka." While in a chat group the defendant contacted her and over a period of time became very sexually explicit with Bekka. At one point, he asks her to meet him at a McDonald's so that they could go back to his place for the purposes of sex. While at the meeting place, he was arrested. He was subsequently charged with attempt to distribute obscene material to a minor, solicitation to commit CSC 3rd and sexually abusive materials. The Court of Appeals dismissed the charges of solicitation and attempt due to the legal impossibility of the crimes occurring. The Michigan Supreme Court held that legal impossibility is not a valid defense in Michigan.

HELD – "The defendant in this case is not charged with the substantive crime of distributing obscene material to a minor in violation of MCL 722.675. It is unquestioned that defendant could not be convicted of that crime, because defendant allegedly distributed obscene material not to a minor, but to an adult man. Instead, defendant is charged with the distinct offense of attempt, which requires only that the prosecution prove intention to commit an offense prohibited by law, coupled with conduct toward the commission of that offense. The notion that it would be 'impossible' for the defendant to have committed the completed offense is simply irrelevant to the analysis. Rather, in deciding guilt on a charge of attempt, the trier of fact must examine the unique circumstances of the particular case and determine whether the prosecution has proven that the defendant possessed the requisite specific intent and that he engaged in some act towards the commission of the intended offense."

As to the solicitation statute, the Court held that the charge was properly dismissed but not because of the impossibility defense. "Furthermore, although we do not agree with the circuit court or the Court of Appeals that legal impossibility was properly invoked by defendant as a defense to the charge of solicitation, we nevertheless affirm the dismissal of this charge. There is no evidence that defendant solicited anyone to commit a felony or to do or omit to do an act which if completed would constitute a felony."

Add to page 4-25

Armed robbery may occur where a weapon is feigned.

📖 People v Taylor, 245 Mich. App. 293 (2001)

The defendant in this case walked into a gas station and placed his hand inside his partially buttoned jacket and into the front of his pants. The victim testified that it appeared the defendant grabbed something in his jacket and that he saw a bulge near defendant's hand. The defendant then stated, "This is a stick up," and, "Open the drawer." The defendant was convicted of armed robbery but he argued that there was not sufficient evidence that he was armed with an article "used or fashioned in a manner to lead the person assaulted to reasonably believe it to be a dangerous weapon." The Court of Appeals disagreed and upheld the conviction.

"In a 'feigned weapon' case, the prosecutor meets the 'armed' requirement of the statute by proving that during the commission of a robbery the defendant simulates a weapon so as to induce the

victim to reasonably believe he is armed. Here, because the defendant placed his hand under his clothing, the victim observed a bulge under the clothing and defendant announced a robbery ('this is a stick up'), all of which led the victim to reasonably believe defendant was armed, we find that the prosecutor met his burden by introducing a sufficient quantum of evidence to prove the "armed" element of armed robbery."

Add to page 4-19

First degree murder for killing a correction's officer

📖 People v Herndon, C/A No. 216239 (June 15, 2001)

Herndon was an inmate at the Huron Valley Men's facility. He was convicted of killing the manager of the prison store because she had asked him to be reassigned due to his inability to lift heavy objects. Her body was discovered in the store in a pool of blood. After the discovery, the prison was locked down and every inmate was examined. Officers observed cuts and bruises on Herndon's hands. They then searched his cell and seized clothing that contained dark stains that later was determined through DNA to be the victim's blood.

Herndon was convicted of first degree murder for killing a correction's officer, which includes a prison or jail guard or other jail personnel. He argued that the statute was unconstitutional because it is a strict liability law, but the Court of Appeals disagreed.

"We conclude that MCL 750.316(1)(c); MSA 28.548(1)(c) cannot and does not create a strict liability crime because, to be convicted of murder under its provisions the prosecutor must prove beyond a reasonable doubt all the elements of one of these three forms of murder, each of which require proof of a specific or general intent."

Custodial Interrogation

After he was taken from his cell he was questioned about the murder without advice of his Miranda rights. This panel of the Court of Appeals held that Miranda warnings were not required because there was no nexus between the custody and interrogation. Since he was already in prison and he was questioned in his regular prison cell, the court held that Miranda warnings were not required. "Herndon was not taken into, or maintained in, custody to facilitate his interrogation." This was not an inherently compelling atmosphere against which Miranda protects.

Search of Cell

Herndon also argued that the search of his cell violated the Fourth Amendment because there was no warrant. The Court of Appeals disagreed holding that an inmate has no expectation of privacy in a jail cell.

Add to page 4-19

Fifteen-year felony for training an animal to fight where the animal kills a person is constitutional.

📖 People v Beam, 244 Mich. App. 103 (2000)

A person was killed by two pit bulls. The owner of the animals was in jail at the time of the incident, but a witness testified that she had seen the owner train the dogs to fight two months after he purchased them. MCL 750.49(10) states:

"If an animal trained or used for fighting or an animal that is the first or second generation offspring of an animal trained or used for fighting attacks a person without provocation and causes the death of that person, the owner of the animal is guilty of a felony."

The owner argued that the statute was unconstitutionally vague and the charges should be dismissed. The Court of Appeals disagreed. "In sum, we conclude that § 10 of the statute is not unconstitutionally vague. It clearly provides notice and fair warning to those who would own animals trained or used for fighting that they do so at their own peril and they may be held criminally liable if their animal kills a person."

Add to page 4-10

Inducing a Minor to commit a felony

📖 People v Pfaffle, C/A No. 218480 (June 5, 2001)

The defendant in this case attempted to convince a fifteen-year-old boy to help him find young children to rape and kill by giving the fifteen-year-old alcohol and cigarettes. The defendant had a tent hidden in the woods where he wanted the act to occur. Inside the tent he kept duct tape, knives, condoms, rubber gloves, and a rubber ball. The plan was to have the fifteen-year-old lure the boys into the woods

where they would be captured and taken to the tent. The two were caught when police located the tent and found the evidence as well as written notes about the plan. The fifteen-year-old testified that he never planned on committing the act but went along with it to get the alcohol and cigarettes. The defendant was convicted of inducing a minor to commit a felony but argued that since the fifteen-year-old was never planning on completing the act and that the act never occurred, he could not be convicted of the charge. The Court of Appeals disagreed.

MCL 750.157b states:

"A person 17 years of age or older who recruits, induces, solicits, or coerces a minor less than 17 years of age to commit or attempt to commit an act that would be a felony if committed by an adult is guilty of a felony and shall be punished by imprisonment for not more than the maximum term of imprisonment authorized by law for that act. The person may also be punished by a fine of not more than 3 times the amount of the fine authorized by law for that act."

"Though the facts of this case indicate that Doe never actually murdered a child, or attempted to do so, the evidence is clear that Pfaffle attempted to persuade Doe to join his plans to rape and murder children by offering him alcohol and cigarettes. This constituted recruitment under the inducement statute."

Add to page 4-5

FIA workers

P.A. 22 of 2001 – MCL 750.81c

A person who communicates to any person a threat that he or she will physically harm an individual who is an employee of the family independent agency and who does so because of the individual's status as an employee of that agency is guilty of a one year misdemeanor.

A person who assaults or assaults and batters an individual while the individual is performing his or her duties as an employee of FIA or because of the individual's status as an employee of FIA and causes:

Physical injury = 2 year felony.
Serious impairment of bodily function = 5 year felony

Add to page 6-10

False impersonation of FIA worker

PA 22 of 2001 – MCL 750.217e

An individual who is not employed by FIA shall not inform another individual or represent to another individual by identification or any other means that he or she is employed by FIA with the intent to do 1 or more of the following:

- Gain or attempt to gain entry into a residence, building, structure, facility, or other property.
- Remain or attempt to remain in or upon a residence, building, structure facility, or other property.
- Gain or attempts to gain access to financial account information.
- Commit or attempt to commit a crime.
- Obtain or attempt to obtain information to which the person is not entitled to under child protection laws.
- Gain access or attempt to gain access to a person less than 18 years of age or a vulnerable adult.

Penalty = 2 year felony

Add to page 4-7

Injury to fetus or embryo

PA 1 of 2001 – MCL 750.90a – 90e

Public act includes embryo under sections prohibiting injury to fetus.

Add to page 4-2

Aiding and abetting

📖 People v Izarraras-Placante, C/A No. 222707 (June 19, 2001)

During a drug deal with an undercover officer, defendant drove a car to the meeting spot. The passenger exited the car and met with the officer where the exchange took place. When the officers tried to

arrest the subjects after the deal, the defendant drove away and was chased by the officers. The two subjects were eventually arrested. Defendant was charged with aiding and abetting the delivery of cocaine.

Under MCL 767.39 a person who aids or abets in the commission of a crime may be convicted and punished as if he directly committed the offense. "To support a finding that a defendant aided and abetted a crime, the prosecution must show that (1) the crime charged was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement that assisted the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time he gave aid and encouragement."

"In this case, defendant confessed to a police officer that he had purchased in Grand Rapids the 55.908 grams of cocaine sold to the under cover officer. During their tape-recorded telephone conversation to arrange the sale, the officer negotiated with Rodriguez regarding the price of the cocaine. The tape indicated that Rodriguez discussed the price of the cocaine with another person, whose voice the officer recognized as defendant's. Defendant also drove Rodriguez to the drug sale on May 17. We believe this evidence, combined with the evidence, which showed Rodriguez delivered the cocaine to the officer, constitutes sufficient evidence to convict defendant on an aiding and abetting theory. The aiding and abetting statute encompasses all forms of assistance rendered to the perpetrator of a crime and comprehends all words or deeds that might support, encourage, or incite the commission of a crime."

Add to page 7-22

Rioting

📖 People v Kim, 245 Mich. App. 609 (May 4, 2001)

Defendant and five others were charged with rioting under MCL 752.541 during a KKK rally in Ann Arbor. During the rally, the five ran up the stairs of city hall and threw rocks at the police and the building. The circuit court dismissed the charges because the statute requires a causing of public terror or alarm and the police were not the public. The Court of Appeals reversed.

"The riot statute does not require that the violent conduct at issue be directed toward the public at large. The evidence established that defendants acted in concert with several others to engage in violent conduct, which caused or created a serious risk of causing public terror or alarm. Ample evidence also established probable cause that each defendant participated in the rush toward police and in throwing projectiles. Thus, the prosecutor presented evidence that the crime of riot was committed and that defendants' committed it."

Add to page 4-20

Contributory Negligence in Negligent Homicide case

📖 People v Moore, 246 Mich. App. 172 (2001)

A person was killed when he clipped the front of a semi trailer, which had pulled out in front of him. The vehicle crossed into oncoming traffic and hit a van head on. The truck driver wanted to add into evidence that the victim was not wearing his seatbelt and that there was marijuana in his blood. The trial court refused to enter the evidence but the Court of Appeals reversed.

"Accordingly, we hold that evidence of the decedent's failure to wear his seatbelt at the time of the accident, while not a defense to negligent homicide, is a factor for the jury to consider in determining whether the defendant's negligence, should the jury even find negligent conduct on the part of defendant, caused the victim's death. We believe that this evidence is clearly relevant regarding causation in the present case, especially under the circumstances where the decedent clipped the front of defendant's truck, apparently lost control of his vehicle, crossed several lanes of traffic, and hit a van head on in the opposite direction of traffic. We also find that the trial court abused its discretion in excluding evidence that the decedent had marijuana in his blood at the time of the accident. As has been stated, while the decedent's contributory negligence is not a defense to a charge of negligent homicide, it is a factor to consider in determining whether the defendant's negligence caused the decedent's death."

Add to page 15-1

Crossing state lines for purposes of D.V.

📖 U.S. v Baggett, 2001 FED App. 0176P (6th Cir.)

A truck driver and his wife had a violent relationship. The wife occasionally accompanied her husband on his trips. On one trip they were returning from California to their home in Tennessee. During an argument the husband grabbed her head and struck it on the steering wheel. He then tore her shirt and choked her before throwing her into the sleeper. He then pulled into a rest area and continued to beat her in a rest area in Oklahoma. He then order her to keep her mouth shut and stay in the sleeper. They drove for awhile when she said she needed to use the bathroom. He pulled into another rest area and again severely beat her. They then drove through Arkansas and made it to their destination in Memphis. He climbed into the sleeper to sleep and she went to use a bathroom. While in the bathroom she passed out and an ambulance was called. When the officer went to the tuck to arrest the defendant he told the officer the assault did not occur in Tennessee but happened in other states.

Section 2261(a)(2) of Title 18 of the U.S. Code states:

“A person who causes a spouse or intimate partner to cross a State line or to enter or leave Indian country by force, coercion, duress, or fraud and, in the course or as a result of that conduct, intentionally commits a crime of violence and thereby causes bodily injury to the person's spouse or intimate partner, shall be punished as provided in subsection (b).”

“In order to find a Defendant guilty of interstate domestic violence, you must be convinced that the Government has proved beyond a reasonable doubt each of the following four elements. One, that the Defendant ... and [the victim] are spouses or intimate partners. Second, that the Defendant caused [the victim] to cross a state line by force, coercion, duress, or fraud. Third, that in the course of or as a result of that conduct, the Defendant intentionally committed a crime of violence upon [the victim]; and finally the fourth element, and that as a result of this crime of violence, [the victim] was bodily injured. With respect to the second element of the offense, which is the only element at issue in this case, the instructions provided: Coercion or duress exists when an individual is subject to actual or threatened force of such a nature as to induce a well-founded fear of impending death or serious bodily harm from which there is no reasonable opportunity to escape.”

The Sixth Circuit held that a jury could find beyond a reasonable doubt that the above elements existed in this case.

MISCELLANEOUS CRIMES

Add to page 6-3

Restitution may include unrecovered buy money

📖 People v Crigler, 244 Mich. App. 420 (2001)

As part of sentencing for delivering marijuana, defendant was ordered to pay $7,650 in restitution to the NET team for the buy money that was used to set up the charges. The Court of Appeals upheld the order based on the Crime Victim Right's act. "Therefore, we conclude from the plain language of the statute, as well as from the intent behind the CVRA, that the Legislature intended to permit narcotics enforcement teams to obtain restitution of buy money lost to a defendant's criminal act of selling controlled substances."

Add to page 6-3

Knowledge of amount for drug cases

📖 People v Mass, MSC No. 115820 (July 5, 2001)

Defendant was convicted as an aider and abettor in the delivery of 225 grams or more but less than 650 grams of cocaine as well as with conspiracy to commit delivery of the same amount of cocaine. In both charges he argued that he did not know he was dealing with 225 grams or more. The Michigan Supreme Court held the following:

"A defendant may be properly convicted of delivery of 225 grams or more but less than 650 grams of cocaine on an aiding and abetting theory, even if he does not know the amount of drugs to be delivered, as long as the jury finds that at least 225 grams of cocaine were delivered."

"A defendant charged with conspiracy to deliver 225 grams or more but less than 650 grams of cocaine is entitled to have the jury instructed that the defendant is guilty only if the prosecution has proved beyond a reasonable doubt that defendant conspired to deliver, not just some amount of cocaine, but at least 225 grams of cocaine."

Add to page 6-3

Delivery may include social sharing

📖 People v Schultz, C/A No. 216299 (July 20, 2001)

Defendant purchased heroin that she shared with her boyfriend. She injected the heroin into his arm and he subsequently died. She was charged with manslaughter and delivery of a controlled substance. The jury acquitted her of the manslaughter charges, but did convict her of the delivery charge. She requested the charges be dropped because delivery should not apply to social drug users. The Court of Appeals disagreed.

HELD – "Defendant's social sharing of the cocaine with the decedent fell within the plain, broad scope of a 'transfer' within MCL 333.7105(1). Had the Legislature wished to authorize for social sharers of controlled substances, like defendant, lesser punishments than those applicable to commercial drug traffickers, it could have done so explicitly. To the contrary, it employed the broad term 'transfer' to define the culpable element of delivery. The plain language of MCL 333.7105(1) would encompass defendant's act of sharing her supply of heroin with the decedent."

Add to page 7-10

Making a false police report

📖 People v Chavis, C/A No. 218911 (July 20, 2001)

The defendant in this case was carjacked. He immediately reported the crime to the police, but lied as to the location of the incident because it had occurred near a crack house and he did not want the police to know why he had been in the area. He was charged with making a false police report. The Court of Appeals dismissed the charges.

HELD – "Here, the statute proscribes the intentional making of a false report of the commission of a crime. MCL 750.411a(1). The plain language of the statute provides that those who make police reports falsely claiming that a crime has been committed are guilty of making a report of a false crime. To construe the statute to encompass false information concerning the details of an actual crime would be a significant departure from the plain language of the statute. Because the false information reported by defendant in the present case did

not pertain to whether a crime occurred, the conviction for filing a false report of the commission of a crime cannot be sustained."

Add to page 7-19

Resisting and Obstructing – Lying to a police officer

📖 People v Vasquez, MSC No. 116660 (July 27, 2001)

Officers responded to a loud party complaint and contacted a subject who was urinating on the front lawn of a residence. The officer suspected that the subject was an intoxicated minor and asked him for his name and age. The subject stated his name was John Wesley Chippeway and that he was sixteen-years-old. It was later determined that the subject was in fact Mark John Vasquez and that he was seventeen years old. The prosecutor charged him with minor in possession and resisting and obstructing under 750.479. The question presented was whether a mere lie to an officer who, attempting to keep the peace, could constitute R and O.

HELD - The Michigan Supreme Court first held that the officer was in fact keeping the peace at the time of the incident. "It is clear that, at the time defendant lied to the officer, the latter was responding to suspected criminal activity, which constitutes an ordinary police function. Because the officer was performing such a lawfully assigned function when he questioned defendant, the officer was attempting to 'keep the peace' within the meaning of the 'resisting and obstructing' statute, when defendant lied to him."

The next issue is whether the defendant obstructed when he lied to the officer. In reviewing the statute the Court held that for obstruction there must be some type of physical or threatened physical conduct on the part of the defendant. "Michigan's 'resisting and obstructing' statute proscribes threatened, either expressly or impliedly, physical interference and actual physical interference with a police officer. Defendant's conduct did not constitute threatened or actual physical interference. Therefore, defendant did not "obstruct" the police officer, within the meaning of MCL 750.479, when he lied to him. Mere lies are insufficient to trigger a violation."

Add to page 4-4

For assault upon a correction's officer the imprisonment must be lawful

📖 People v Clay, C/A No. 211768 (August 31, 2001)

In this case the suspect was arrested for CCW. It was later determined that the officers had made an illegal search and the CCW charges were dropped. After he was lodged on the charge he assaulted a corrections officer. The Court of Appeals initially upheld the charges even though the imprisonment was improper. On remand from the Michigan Supreme Court they reversed their earlier decision and held that the assault charges would have to be dismissed because he had not been "lawfully imprisoned."

Add to page 7-11

Escape from lawful custody from under MCL 750.197a

📖 People v Lawrence, C/A No. 220598 (June 5, 2001)

Defendant was arrested and placed in the back seat of a police car. Just as the vehicle was placed in motion, he opened up the back door and ran away. He was captured a short time thereafter. He was charged under MCL 750.197a, which states:

Any person who shall break or escape from lawful custody under any criminal process, including periods while at large on bail, shall be guilty of a misdemeanor punishable by imprisonment in the county jail for not more than 1 year, or by a fine of not more than $500.00.

The question presented in this case was whether the defendant was under any criminal process. The Court of Appeals reversed his conviction on the basis that criminal process under the statute requires some type of court jurisdiction over the subject. "At the time of defendant's action, no court had acquired or exercised jurisdiction over him, nor had any court compelled his appearance through issuance of a summons. Thus, notwithstanding the fact that this was a lawful, warrantless arrest, criminal proceedings stamped with a court's approval had not yet been initiated against defendant. Our conclusion that the statute refers to individuals who are, in one form or another, already under court order is supported by the additional language of § 197a, which indicates that "'under any criminal process'" includes "'periods while at large on bail.'"

Add to page 6-8

Terrorism Legislation

P.A. 135 of 2001 (effective 10-24-01)

MCL 750.200l creates a five-year felony to "commit an act with the intent to cause an individual to falsely believe that the individual has been exposed to a harmful biological substance, harmful biological device, harmful chemical substance, harmful chemical device, harmful radioactive material or harmful radioactive device."

- Five year felony
- Subject may be responsible for costs of response.

P.A. 136 of 2001 (effective 10-24-01)

Increased penalties under MCL 750.200j from a misdemeanor to felony for manufacturing, delivering, possessing, transporting, placing, using, or releasing for an unlawful purpose a:

Chemical irritant

A smoke device.

An imitation harmful substance or device.

SEARCH AND SEIZURE

📖 Northrop v. Trippett, 2001 WL 1018702 6th Cir.(Mich.) Sep 07, 2001

DPD received an anonymous call that two black males, one wearing a green jeans outfit, were selling drugs at the Greyhound Bus station in Detroit. The caller provided no other information. Two DPD officers responded and located two subjects talking to each other. One was wearing a green outfit. As the officers approached, one subject placed a duffel bag under his seat and then attempted to walk by the officers. He was stopped. Both subjects were asked for ID and told to empty their pockets. When asked if they had any drugs one subject admitted to having marijuana in his sock. He was arrested and they then opened the duffel bag and found a large amount of cocaine.

The Sixth Circuit dismissed the charges based on JL v Florida. "Here, the officers stopped defendants based solely on a tip from an anonymous source. The officers knew nothing about the informant. And in giving the tip, the informant only told the police that two black males, one wearing a particular type of name brand clothing, were selling drugs in the Greyhound Bus Station. The tip did not further describe Northrop. Nor did the tip provide any predictive information to allow the officers to assess its reliability. Further, the officers did not observe any suspicious behavior that would have justified the stop independent of the tip."

Add to page 18-19

Failure to leave copy of affidavit is not grounds for suppressing the evidence seized.

📖 People v Sobczak-Obetts, 463 Mich. 687 (2001)

Where officers failed to leave a copy of the affidavit after executing a search warrant, the court held this to be a procedural violation and that the legislature did not intend for the exclusionary rule to apply to this type of violation.

Add to page 18-35

A 911 hang-up may not by itself allow for an entry into a house under the emergency exception.

📖 People v Beuschlein, C/A No. 222317 (May 11, 2001)

Officers were dispatched to an open 911 call. Dispatch reported there was a domestic in progress possibly involving guns and knives. As the officers approached they knocked on the door but no one answered. They tried to gain entry but the door was locked. Inside they heard a lot of wrestling or moving around, a lot of shuffling around inside the house. A woman then answered the door and the officers entered. Once inside, they observed the defendant in the back bedroom and ordered him out and placed him in handcuffs for "our safety and everybody's safety in the house because at that point he did not know how many more people were in the house." They then observed cocaine on the kitchen floor, front room and on a tray in the bedroom. The Court of Appeals upheld the entry and the seizure of the drugs.

"We hold that police may enter a dwelling without a warrant when they reasonably believe that a person within is in need of immediate aid. They must possess specific and articulable facts that lead them to this conclusion. In addition, the entry must be limited to the justification therefor, and the officer may not do more than is reasonably necessary to determine whether a person is in need of assistance, and to provide that assistance."

"The police in this case had an unambiguous dispatch identifying defendant's home as the scene of a serious domestic disturbance. In addition, although they did not see any physical injury when Collier opened the door, they heard sounds of 'wrestling' and had reason to believe there may be a gun or knives on the premises. Under these circumstances, the police had sufficient articulable facts on which to base their conclusion that someone inside defendant's home needed immediate aid."

"Next, defendant argues that the warrantless search of his entire house incident to his arrest violated his Fourth Amendment rights. Defendant contends the circumstances did not justify a protective sweep because there was no indication in the dispatch or from the situation at the home that there was a third party in his home. We disagree."

"Having already established the legality of the officers' warrantless entry into defendant's mobile home, the ensuing protective sweep of the premises, after defendant was handcuffed, was likewise permissible. The Fourth Amendment permits a properly limited protective sweep in connection with an in-home arrest if the police reasonably believe that the area in question harbors an individual who poses a danger to them or to others. Such a search is quick and limited, and conducted for the sole purpose of ensuring the safety of police officers and other persons."

Add to page 9-1

An officer does not violate the Fourth Amendment if he makes a lawful arrest of a person with probable cause, even if the offense is minor.

📖 Atwater v City of Lago Vista, 121 S.Ct. 1536 (2001)

In a recent case decided by the United States Supreme Court, the court examined an officer's ability to arrest and lodge a person

stopped for a minor traffic offense. The case involved a woman stopped in Texas. The reason for the stop was that the woman and her children were not wearing seatbelts, which is a misdemeanor, punishable only by a fine, under Texas law. The warrantless arrest of anyone violating these provisions is expressly authorized by Texas law, but the police may issue citations in lieu of arrest. The officer observed the seatbelt violations, pulled Atwater over, verbally berated her, handcuffed her, placed her in his squad car, and drove her to the local police station, where she was made to remove her shoes, jewelry, and eyeglasses, and empty her pockets. Officers took her "mug shot" and placed her, alone, in a jail cell for about an hour, after which she was taken before a magistrate and released on bond.

The question presented before the Court was whether the officer violated the woman's Fourth Amendment rights against unreasonable search and seizure. In a 5 to 4 decision, the Court held that the woman could not sue the officers. The woman's arrest satisfied constitutional requirements. "It is undisputed that the officer had probable cause to believe that the woman committed a crime in his presence. Because she admits that neither she nor her children were wearing seat belts, the officer was authorized (though not required) to make a custodial arrest without balancing costs and benefits or determining whether Atwater's arrest was in some sense necessary. Nor was the arrest made in an extraordinary manner, unusually harmful to her privacy or physical interests. Whether a search or seizure is "extraordinary" turns, above all else, on the manner in which it is executed. Atwater's arrest and subsequent booking, though surely humiliating, were no more harmful to her interests than the normal custodial arrest."

Add to page 18-3

Thermal Imaging violates the Fourth Amendment without a warrant.

🕮 Kyllo v United States, 121 S.Ct. 2038 (2001)

Officers flew a helicopter over the defendant’s residence and with the use of a thermal imager were able to determine that the garage roof and sidewall were relatively hot and the overall house was substantially warmer than neighboring houses. Officers used this information along with additional information to obtain a search warrant. The search warrant indicated that the heat was consistent with the high-intensity lamps typically used for indoor marijuana growth. The Supreme Court was asked if use of the thermal imager violated the Fourth Amendment without a warrant.

HELD – “Where the Government uses a device that is not in general public use, to explore details of a private home that would previously have been unknowable without physical intrusion, the surveillance is a Fourth Amendment ‘search’ and is presumptively unreasonable without a warrant. Thus, obtaining by sense-enhancing technology any information regarding the home’s interior that could not otherwise have been obtained without physical intrusion into a constitutionally protected area constitutes a search at least where, as here, the technology in question is not in general public use.” This case was remanded to the lower courts to determine if probable cause existed absent the evidence from the thermal imaging.

Add to page 18-8

Pretext arrests are constitutional

Arkansas v Sullivan, 121 S.Ct. 1876 (2001)

Officers stopped defendant for speeding and having an improperly tinted windshield. Upon seeing Sullivan’s driver’s license the officer recognized him from intelligence reports that reported Sullivan was involved in narcotics. Sullivan then opened his car door in an unsuccessful attempt to locate his registration and proof of insurance. At that point, the officer observed a rusty roofing hatchet on the floorboard of the car. Sullivan was arrested for speeding, driving without his registration and insurance, carrying a weapon, and improper window tinting. A subsequent inventory search of the car revealed drugs and Sullivan was charged.

Sullivan moved to suppress the evidence on the basis that the search was merely a pretext and sham to search his car. The Arkansas Supreme Court suppressed the evidence but the United States Supreme Court reversed based on the previous case of United States v Whren which upheld pretext stops as valid under the Fourth Amendment as long as the officers had an objectively valid basis for the initial stop.

HELD – “The Arkansas Supreme Court's holding to that effect cannot be squared with our decision in Whren, in which we noted our ‘unwilling[ness] to entertain Fourth Amendment challenges based on the actual motivations of individual officers,’ and held unanimously that ‘[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.’ That Whren involved a traffic stop, rather than a custodial arrest, is of no particular moment; indeed, Whren itself

relied on United States v. Robinson, 414 U.S. 218, (1973), for the proposition that "a traffic-violation arrest ... [will] not be rendered invalid by the fact that it was 'a mere pretext for a narcotics search."

Officers should be aware of the concern of four Justices who stated, “If experience demonstrates anything like an epidemic of unnecessary minor-offense arrests, (we) hope the Court will reconsider its recent precedent.”

Add to page 18-31

Reasonable suspicion to stop a vehicle

📖 People v Oliver, 464 Mich. 184 (2001)

An officer responded to a bank robbery involving two black males. Near the scene he stopped and asked two employees of a store who were standing outside if they had seen two black males running. They answered no and the officer then drove to a nearby apartment complex because he believed that to be a good place to hide a getaway car. The officer testified that during his nineteen years experience as a police officer, he has investigated about 20 bank robberies. He also testified that it has been his experience that there usually is another person involved who drives the getaway car. Based on this, he testified that he was looking for more than two subjects in a car. As he pulled into the complex, a green Mercedes with four black male occupants was pulling out of the driveway. The officer testified at the suppression hearing that “‘[A]s I was passing by them [the occupants of the Mercedes], I turned and looked over at them, and all four subjects looked directly ahead. They would not, any of them, look over at me.’ The officer said that he found this ‘very unusual’ because, on the basis of his nineteen years of experience as a police officer, ‘[W]ell basically, because people always look at the cops. When you drive by, they always look over and see who’s in the car or—they just always look at you.’ Deputy Elder testified that he saw the Mercedes within ten or fifteen minutes of the dispatch regarding the bank robbery and that he passed within six to eight feet of the Mercedes when they passed by each other at the entrance to the apartment complex.” The officer then called for backup and followed the car as it took a circular route instead of a more direct route that would have taken them directly by the bank. The vehicle was stopped and evidence of the robbery was located. The defendants argued that there was no reasonable suspicion to allow the stop. The Michigan Supreme Court disagreed.

"We conclude that, under the totality of the circumstances, Deputy Elder's investigatory stop of the car at issue was supported by reasonable suspicion that occupants of that car may have been involved in the robbery of the Republic Bank. The reasons for that conclusion include: (1) the deputy encountered the car near the crime scene, given that the apartment complex was within a quarter mile of the bank; (2) the time was short, with at most fifteen minutes elapsing from the time of the report of the robbery to the traffic stop; (3) the car was occupied by individuals who comported with the limited description that the officer had at his disposal; (4) Deputy Elder had tentatively eliminated the direction north of the bank as an escape route on the basis of the information he received from the carpet store employees; (5) on the basis of his familiarity with the area and experience with crimes of this nature, Deputy Elder formed the reasonable and well-articulated hypothesis that the robbers had fled to the secluded Westbay Apartments; (6) the deputy also reasonably hypothesized on the basis of his experience that the robbers would use a getaway car to try to escape from the area; (7) Deputy Elder also reasonably inferred on the basis of his experience that a driver would probably be at the getaway car waiting for the actual robbers; (8) the behavior of each of the car's four occupants in seeming to avoid looking in the direction of the deputy's marked police car was atypical; (9) the car was leaving the apartment complex, which is consistent with it being a getaway car whose occupants were attempting to leave the area; (10) the car followed a circuitous route that avoided driving by the site of the bank robbery."

Add to page 18-7

An unauthorized driver may have standing

🕮 United States v Smith, 2001 WL 984951 C.A.6 (Aug. 29, 2001)

Defendant was stopped while driving a rental car. His wife was listed as the sole driver, however his credit card was used to secure the vehicle. The Sixth Circuit concluded that even though he was not listed as an authorized driver, he still had standing to challenge the search. The following factors established standing: "First, Smith was a licensed driver. Second, Smith was able to present the rental agreement and provided the officer with sufficient information regarding the vehicle. Third, Smith was given the vehicle by his wife, who was listed as the authorized driver. Fourth, Smith's wife had given him permission to drive the vehicle. Fifth, and most significantly, Smith personally had a business relationship with the rental company. Smith called the rental company to reserve the

vehicle and was given a reservation number. He provided the company with his credit card number, and that credit card was subsequently billed for the rental of the vehicle. His wife, Tracy Smith, picked up the vehicle using the confirmation number given to Smith by the company. Smith had an intimate relationship with Tracy Smith, the authorized driver of the vehicle who gave him permission to drive it."

Reasonable suspicion to detain

The officer in this case based reasonable suspicion to detain the defendant on a number of factors. One was that the defendant was nervous that his passenger appeared "stoned" and had white mucous around his mouth. The vehicle was messy with food wrappers and body odor was emanating from the vehicle as though the occupants had not bathed during the duration of their trip. The Sixth Circuit upheld the lower courts ruling that these factors did not establish reasonable suspicion.

HELD – "Viewing these factors in the totality of the circumstances, we conclude that Officer Fulcher did not have a reasonable, articulable suspicion of criminal activity sufficient to detain Steven Smith after the completion of the initial traffic stop. Although the government presented several factors which could, under different circumstances, and in combination with other factors, support a finding of reasonable suspicion, under the facts of this case, they merit little, if any, weight in our analysis. We give little weight to Steven's initial nervousness and his prompt presentation of the rental agreement, Randy's "stoned" appearance, the fact that neither Steven nor Randy was listed as an authorized driver, and the fact that Officer Fulcher doubted Steven's travel plans, because they are generally innocent factors, a conclusion supported by the fact that they did not warrant Officer Fulcher's further investigation at the time. Thus, we are left to consider Steven's nervousness during questions about narcotics and weapons, the body odor emanating from the vehicle, and the unkempt condition of the vehicle. With respect to Steven's nervousness, however, it was minor in degree when compared to those discussed in decisions such as Erwin and Hill. The food wrappers, soda cans and cooler in the vehicle are factors which have been given little, if any, weight by other courts considering the question of reasonable suspicion, and were consistent with Steven's travel plans. Likewise, the men's body odor receives little weight in our determination. Even considering all of the government's proffered factors as a whole, we must conclude that Officer Fulcher did not possess a reasonable, articulable suspicion that criminal activity was afoot. He was, perhaps, just shy of establishing reasonable suspicion. If he had pursued his initial hunch,

and had asked additional questions regarding Steven's rental vehicle or travel plans, or if he had further investigated Randy's condition, then perhaps he would have uncovered a discrepancy or sufficiently nervous behavior, or some other objective, reliable indication of criminal activity. However, given the facts which we have been presented, it appears that the officer, whose primary duty was drug interdiction, may have identified a vehicle and occupants which fit a profile, and based on that, detained Steven after the completion of the traffic stop without developing a reasonable, articulable suspicion of criminal activity. In fact, it seems that it was Steven's refusal of consent to search which triggered Officer Fulcher's decision to use the narcotics dog. That refusal is clearly not an appropriate basis for reasonable suspicion."

Add to page 18-27

"Knock and talk" is a valid procedure if done properly

📖 People v Frohriep, C/A No. 223755 (October 12, 2001)

Officers received information that defendant may have controlled substances on his property. Since there was not sufficient evidence to obtain a search warrant the officers decided to do a "knock and talk." Officer described the procedure as going to the suspect house, engaging in conversation and attempting to gain consent to search.

In this case officers located the subject in an open area between his house and barn. They identified themselves and informed him that they believed he had controlled substances on the premises and asked for consent to search. The trial court determined that the defendant consented to a search. One officer entered the pole barn and located marijuana in a freezer. They then asked to enter a trailer that was locked. The subject retrieved the key and opened the door where they found scales and he admitted to using the scales to weigh marijuana. At that point, the subject stated, "wait, wait, just a minute." The officers asked him to sign a consent form and he refused. The officers then obtained a search warrant and found additional evidence.

The Court of Appeals first upheld the "knock and talk" procedure. "We conclude that in the context of 'knock and talk' the mere fact that the officers initiated contact with a citizen does not implicate constitutional protections. It is unreasonable to think that simply because one is at home that they are free from having the police come to their house and initiate a conversation. The fact that the

motive for the contact is an attempt to secure permission to conduct a search does not change that reasoning. We find nothing within a constitutional framework that would preclude the police from setting the process in motion by initiating contact and, consequently, we hold that the 'knock and talk' tactic employed by the police in this case is not unconstitutional."

"That is not to say, however, that the 'knock and talk' procedure is without constitutional implications. Anytime the police initiate a procedure, whether by search warrant or otherwise, the particular circumstances are subject to judicial review to ensure compliance with general constitutional protections. Accordingly, what happens within the context of a 'knock and talk' contact and any resulting search is certainly subject to judicial review. For example, a person's Fourth Amendment right to be free of unreasonable searches and seizures may be implicated where a person, under particular circumstances, does not feel free to leave or where consent to search is coerced."

In analysis this facts of this case, the Court held that the Fourth Amendment had not been violated. "Here, the 'knock and talk' procedure that the police utilized involved police officers initiating an ordinary citizen contact. The police action, i.e., approaching defendant as he was standing in his yard, did not amount to a seizure of defendant. The police simply identified themselves, told defendant they had been informed that he had controlled substances on his property, and asked defendant's permission to 'look around.' There is no indication that defendant was not free to end the encounter. Indeed, the testimony at the suppression hearing does not support the notion that defendant felt threatened or coerced. Thus, the initial contact with defendant did not have any constitutional implications on the basis of a seizure because there is no indication that any seizure of defendant occurred. Although we can envision a scenario where the police conduct when executing the 'knock and talk' procedure evidences an unreasonable seizure or results in an unreasonable search, the facts in the present record do not suggest such a situation."

Defendant also argued that the officers exceeded the scope of consent given and did not give him an opportunity to revoke his consent. The Court held there was nothing on the record to indicate that the officers were coercive or demanding in any way and that he did not place any limitation on the scope of the search. "A reasonable person would understand that the police intended to search for

controlled substances on the premises in any place where controlled substances could be located."

Add to page 18-15

No-Knock Warrant

📖 United States v Jacobsen, 2001 WL 1159689 6th Cir.(Ky.) Oct 03, 2001

Officers had information that drug dealers from Detroit who were in the process of selling drugs occupied a residence. Included in an affidavit for a search warrant was the following request: "A no-knock search warrant is requested because the informant states that deals inside the house are usually done near the bathroom in case the police should come in the house. Also, it has been the experience of Narcotics detectives that most of the dealers from Detroit have been armed when apprehended. Within the past 48 hours the affiant made a controlled purchase of narcotics at 163 Rand Ave. through a confidential informant. This informant has made 9 prior controlled purchases and provided numerous pieces of information that has [sic] been independently corroborated."

Based on this information the trial court issued a no-knock warrant due to exigent circumstances. The Sixth Circuit upheld the no-knock warrant and entry. "Had the affidavit merely contained generalized allegations of drug dealing within the residence, the government would not have demonstrated the kind of exigency required to justify a no-knock warrant. Likewise, boilerplate language concerning the possible destruction of evidence would not be sufficient. Where, as here, however, the affidavit in support of the warrant application includes recent, reliable information that drug transactions are occurring in the bathroom 'in case the police should come in the house,' it is reasonable to infer that this precaution is taken to facilitate the destruction of evidence and thus a no-knock warrant is within the range of alternatives available to the issuing judge or magistrate."

ADMISSIONS AND CONFESSIONS

Add to page 10-2

The "public safety" exception for Miranda applies to an officer's concern for safety.

📖 People v Attebury, 463 Mich. 662 (2001)

Officers obtained an arrest warrant for Mr. Attebury after he assaulted his wife with a pistol. They had also received information that Mr. Attebury that he was suicidal and homicidal. After he was arrested, officers asked him if there were any weapons in the house and he responded, "Not at this time." The officers then asked him where the weapon was that was used in the assault and he indicated that it was at his brother's house. At no time prior to this conversation were Miranda rights advised. The Supreme Court was applied the public safety exception to Miranda warnings to this case.

HELD: "Here, however, defendant easily could have hidden the weapon in one of the dresser drawers to which he had immediate access. Thus, as in Quarles rather than Orozco, the officers' initial attempts to ascertain the location of the gun were directly related to an objectively reasonable need to secure protection from the possibility of immediate danger associated with the gun. Moreover, the pre-Miranda questioning in the present case related solely to neutralizing this danger. The officers only asked about the whereabouts of the gun and not other broader questions relating to investigation of the crime. This case is thus unlike Orozco, where the pre- Miranda questioning included general investigation, such as whether the suspect was at the scene of the crime, which was unrelated to any immediate danger to the officers or the public. Here, once the officers were satisfied that defendant posed no immediate threat of danger to them, they informed defendant of the Miranda rights and began their general investigation. For all of these reasons, the pre-Miranda questioning at issue in this case falls squarely within the public safety exception to Miranda."

"In sum, we hold that the officers were justified in forgoing immediate adherence to the Miranda rule, given the exigencies of the situation in defendant's apartment at the time of his arrest. Accordingly, the trial court did not err in refusing to suppress defendant's statement or the gun."

Add to page 10-11

After a suspect requests an attorney under the Sixth Amendment, officers may initiate questioning on different offenses.

📖 Texas v Cobb, 121 S.Ct. 1335 (2001)

The suspect in this case was arrested for home invasion. He confessed to the charge but denied knowledge of a woman and child who had disappeared from the residence. He was charged with burglary and counsel was appointed to represent him. Later, he confessed to his father that he had killed the woman and her child during the B and E. The father told police and they interviewed him while he was in custody. He waived his Miranda rights and confessed to the murders. The question presented in this case was whether the officer could initiate questioning with him after an attorney was appointed for him for the burglary charge.

The United States Supreme Court held that the officers could initiate the questioning. The Sixth Amendment right to counsel which attaches during formal judicial proceeding is offense specific. In this case, the officers could not have initiated questioning about the burglary complaint, but could initiate questioning about the murder charges because they were different offenses. The Court held that the charge of murder is not the same offense as burglary and thus the questioning was allowed.

Add to page 10-13

A person must unequivocally assert his or her right to remain silent or right to an attorney before police must stop the questioning.

📖 People v Adams, 245 Mich. App. 226 (2001)

During an interview for a robbery/murder, the following dialogue between the suspect and detective occurred:

Detective: Okay. Was the motive for this [to] pay your bills, take care of your baby? Take care of Anitra. . .

MA: I'm not going to answer that question.

WH: Okay, you don't have to, but that's an important why.

MA: That's an important why, but I'm not going to answer that question, 'till I have a lawyer present.

WH: Okay. . .

MA: But I'll answer—you can keep asking me questions and I'll answer the ones that I feel I can answer for you.

The defendant argued that the police did not honor his invocation to remain silent and his right to an attorney because they continued to question him. The Court of Appeals disagreed. "The record shows that while defendant made an unambiguous, albeit limited, request for counsel with respect to answering the question about the motive for the murder, his immediate statement that the detective could continue to ask questions about the murder and that he would answer 'the ones that I feel I can answer for you' permitted the detective to question him further, within the limits that defendant established."

Add to page 10-14

"**After a knowing and voluntary waiver of the Miranda rights, law enforcement officers may continue questioning until and unless the suspect clearly requests an attorney."**

📖 People v Adams, 245 Mich. App. 226 (2001)

During an interview for a robbery/murder the following dialogue occurred between a suspect and detective.

Suspect: So when would I be able to talk to a lawyer if I wanted to talk to a lawyer?

Detective: We can stop the interview right now.

Suspect: Can I talk to him right now?

Detective: Sure. We'll stop the interview. Once you say you want to talk to a lawyer, by law, I stop immediately. Okay? And will not continue. All right?

Suspect: Can you give me about five minutes just to sit here and think?

"The question here is whether defendant's statement, 'Can I talk to him [a lawyer] right now?' constitutes a clear request for an attorney. We hold that this utterance was not sufficient to invoke the right to counsel and cut off all further questioning under the specific circumstances of this case. The transcript reveals that defendant began this exchange with the police detective by asking when he would be able to talk to a lawyer if he wanted to do so. Only when the police detective correctly answered that they could stop the interview 'right now' did defendant ask if he could talk to an attorney 'right now?' The police detective then, again correctly, told defendant that they would stop the interview if he wanted to talk to a lawyer. Critically,

defendant next asked for 'about five minutes' to think. This clearly indicated that defendant's previous questions were merely inquiries into the way the process worked, not an actual demand for an attorney. Further, when defendant subsequently began to talk about the crime, the police detective asked him to 'stop and think for a minute,' to which defendant responded, 'I am thinking as I go along.' The police detective stopped defendant and urged him to think about what he was doing yet another time. Despite these warnings, defendant still stated that he was willing to answer 'some' of the police detective's 'questions right now.'"

"Under these circumstances, we conclude that defendant's statement, 'Can I talk to him right now?' was ambiguous and insufficient to invoke the right to counsel at his custodial interrogation. Therefore, the police detective was not required to cease all questioning. Accordingly, the trial court did not err in denying defendant's motion to suppress the videotaped statement by ruling that defendant did not unequivocally assert the right to counsel."

Add to page 10-2

The Courts will examine the objective facts in determining if custody occurs for Miranda purposes.

📖 People v Coomer, 245 Mich. App. 206 (2001)

The police suspected that defendant had been involved in a murder. They went to her house to interview her. During the interview, two marked police units and three unmarked cars were parked outside her apartment. Also during the interview, two officers were standing outside her apartment door. The officers told her she was not under arrest and that if she wanted them to leave they would. The officers also testified that the suspect appeared to be fine and although she claimed to have smoked marijuana earlier she did not appear to be under the influence. She argued that her subsequent confession should have been suppressed because she was in custody and was not advised of her Miranda rights. The Court of Appeals disagreed.

"We find that the trial court did not err in ruling that defendant was not in custody when she gave the oral argument at her apartment. The evidence showed that defendant permitted the police officers to enter her apartment building and permitted them to enter her apartment. The officers did not display weapons, and the officer indicated that he informed defendant several times that she was not under arrest. The officer also told defendant that if she wanted them to leave, they would go. Contrary to defendant's contention, her subjective belief that she was not free to leave (because the officer asked her about the

murder) is not dispositive because an objective assessment of the totality of the circumstances indicates that she was not in custody or under arrest when she gave her oral statement. Defendant proceeded to give a statement, largely in narrative form, with little police questioning. She fully acknowledged that she was not compelled or coerced to give a statement."

Add to page 10-2

Interview of child

📖 People v SLL, 246 Mich. App. 204 (2001)

A 13 year old boy was accused of sexually touching two girls ages four and seven. The officer asked the 13-year-old and his mother to come to the station. The officer first talked to the mother and advised her of the charges. He then asked to talk to the 13-year-old alone. The mother agreed. The officer also advised her that she could contact an attorney for her son if she wanted to. She declined. Without advising the 13-year-old of his rights, the officer interviewed him for thirty to forty minutes during which time the juvenile confessed to the charges. The trial court suppressed the statements but the Court of Appeals reversed.

"A juvenile's confession is admissible if, under the totality of the circumstances, the statement was voluntarily made. We are left with a definite and firm conviction that the trial court erred in finding that defendant's statements were involuntary. Here, the trial court relied on the failure of the police officer to give Miranda warnings and separating defendant from his mother. We conclude that these factors do not support a finding that defendant's statements were involuntary. With regard to Miranda, the trial court was correct when it held that the warnings were not required. If not required, we believe it is clearly erroneous to hold that the failure to give them is grounds for a finding that a statement is involuntary. Further, we note that there is no claim made, nor can we find a basis for concluding that either the statute or court rules pertaining to juveniles were violated. Defendant's legal rights were complied with in every respect by the officer conducting the interview."

"In addition, we find that the separation of defendant from his mother, although potentially troublesome in an analysis of the voluntariness of a statement, under the totality of the circumstances here, does not merit a finding that defendant's statement was involuntary. Defendant knew his mother had consented to his talking alone with the officer

and that she was readily available to him. No manipulation of defendant or his mother by the police is established by the circumstances. To the contrary, everything was done openly and with the knowledge and consent of defendant and his mother. We believe it is clearly erroneous to conclude that interviewing a juvenile under these circumstances constitutes any evidence from which it is reasonable to conclude that the resulting statements were involuntarily made."

EVIDENCE

Add to page 8-15

Testimony via videotaping is upheld

📖 People v Pesquera, 244 Mich. App. 361(2001)

During a CSC trial where the victims were young children, the victim's testimony was videotaped and played in court. The defendant argued that this violated his right to confront the witnesses against him. The Court of Appeals disagreed.

"We further hold that defendant's confrontation rights were adequately protected by the procedure employed by the trial court to memorialize the children's testimony. The trial court examined the testimonial competency of the children before they were sworn in to testify. The course of the testimony was presided over and controlled by the trial court, with defendant being afforded a full opportunity to cross-examine each child. Defendant was able to assist in that cross-examination by conferring with his attorney after having viewed the testimony as it was taken. Additionally, the fact that the children testified in the courtroom before the presiding judge only served to affirm to the children the seriousness of the matter. Finally, we note that the jury was able to view the appearance and demeanor of the children when the videotape was shown to the jury the following day."

Add to page 8-5

Relevancy of Photos

📖 People v Watson, C/A No. 218219 (May 4, 2001)

Defendant was charged with CSC involving his stepdaughter. The prosecutor entered evidence that the defendant carried a picture of

the victim's naked buttocks in his wallet. He argued that the pictures should not be admissible because they were not relevant to the charges. The Court of Appeals disagreed and held that the pictures were relevant to show motive. The photograph showed that defendant had a motive to have sexual relations with his stepdaughter, which tended to prove that the alleged sexual assaults actually took place.

LIABILITY

Add to page 17-2

Civil liability – Special relationship

📖 Smith v Jones, C/A No. 215460 (June 5, 2001)

The plaintiffs in this case called 911 to report suspicious activity in an alley near their house. Officers arrived and found several subjects and placed them in the rear of the patrol car. They then drove to the plaintiffs house and parked outside. One officer made contact with the caller as the other officer and subjects waited in the patrol car. The officers determined there was insufficient evidence to charge the subjects with anything so they let them go. Later that evening, the plaintiff's house was firebombed. No one was charged in the attack, but the plaintiff's sued the officers on the basis that the firebombing was in retaliation for the 911 call.

In order to sue for negligence, an essential element is duty between the officer and the plaintiff. In Michigan, before there is a duty, the officer must have a special relationship with the person who is suing. A special relationship exists where

(1) an assumption by the [police officer], through promises or actions, of an affirmative duty to act on behalf of the party who was injured;

(2) knowledge on the part of the [police officer] that inaction could lead to harm;

(3) some form of direct contact between the [police officer] and the injured party; and

(4) that party's justifiable reliance on the [police officer's] affirmative undertaking."

The Court of Appeals reversed the trial court and found no liability. "In the instant case, we conclude that the public-duty doctrine shields

defendants from liability because sufficient evidence of a special relationship between defendants and plaintiffs is lacking. First, the evidence does not support the assumption by defendants, through promises or actions, of an affirmative duty to act on behalf of plaintiffs. Defendant Jones' alleged statement to plaintiff Angelus Williams during his neighborhood investigation and very brief encounter with her at her front door, to the effect that 'don't worry about it that he'll [Jones] take care of it and he'd get back with us later,' uttered in the face of no perceivable threat, is lacking in specificity and cannot reasonably be construed as a promise to protect the Smith household. Second, the record indicates that defendants lacked any knowledge that their alleged inaction could lead to harm. The persons detained by defendants were suspected of committing a non-violent property offense, they were not currently wanted by law enforcement agencies, and there was no indication that they had a history of violent actions. The evidence shows that defendants had no knowledge of any threats made by the parties against the Smith family or any motive for such threats. Indeed, no one could reasonably foresee that a firebombing would result from a brief detention in a patrol car on suspicion of a non-violent offense which did not culminate in an arrest or formal charges. Third, although the element of direct contact is present in this case, a special relationship cannot be based on direct contact alone. As the defendants aptly note, police officers have direct contact with scores of citizens in the course of a day; such contact, in the absence of the other requisite elements outlined in White, supra, cannot serve to establish a special relationship. Finally, the fourth element, justifiable reliance, is wholly unsupported by the evidence. The alleged statement made by defendant Jones to Angelus Williams was so general and nebulous that it cannot reasonably be construed as invoking reliance on defendants for protection."

Add to page 17-4

Civil Rights Violations

📖 Saucier v Katz, 121 S.Ct. 2151(2001)

Police in this case arrested the plaintiff while he protested during a speech by Vice President Al Gore. He sued the officers for excessive force as a civil rights violation. The Ninth Circuit granted summary judgement based on qualified immunity. The Supreme Court upheld the qualified immunity but held the analysis the Ninth Circuit used was improper.

HELD – “The initial inquiry is whether a constitutional right would have been violated on the facts alleged, for if no right would have been violated, there is no need for further inquiry into immunity. However, if a violation could be made out on a favorable view of the parties' submissions, the next, sequential step is whether the right was clearly established. This inquiry must be undertaken in light of the case's specific context, not as a broad general proposition. The relevant, dispositive inquiry is whether it would be clear to a reasonable officer that the conduct was unlawful in the situation he confronted.”

Under this analysis, the United States Supreme Court upheld the qualified immunity for the officer. “Assuming that a constitutional violation occurred under the facts alleged, the question is whether this general prohibition was the source for clearly established law that was contravened in the circumstances. In the circumstances presented to petitioner, which included the duty to protect the Vice President's safety and security from persons unknown in number, there was no clearly established rule prohibiting him from acting as he did. This conclusion is confirmed by the uncontested fact that the force used—dragging Katz from the area and shoving him while placing him into a van--was not so excessive that respondent suffered hurt or injury.”

Add to page 17-4

Changed definition of “Governmental function” for liability purposes.

P.A. 131 of 2001 (Effective October 15, 2001) – MCL 691.1401

"Governmental function" is an activity that is expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law. Governmental function includes an activity, as directed or assigned by his or her public employer for the purpose of public safety, performed on public or private property by a sworn law enforcement officer within the scope of the law enforcement officer's authority.”